

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX HERRERA,

Defendant and Appellant.

A143238

(City & County of San Francisco  
Super. Ct. No. SCN219357)

A jury convicted Herrera of first degree murder and attempted robbery. Prior to sentencing, the court denied Herrera's motion to dismiss a prior strike felony under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court subsequently sentenced Herrera to a prison term of 51 years to life. Herrera now appeals the sentence, claiming it was error to deny his *Romero* motion. We see no error and affirm.

**I. BACKGROUND**

**A. Charges and Convictions**

Herrera was charged by information with murder (Pen. Code,<sup>1</sup> § 187, subd. (a)—count 1) and attempted robbery (§§ 664, 211—count 2). The information further alleged that Herrera had personally used a deadly weapon to

---

<sup>1</sup> All further unspecified statutory references are to the Penal Code.

commit both offenses (former § 12022, subd. (b)(1)), had previously been convicted of a serious and/or violent felony (§§ 667, subds. (d)-(e), 1170.12, subds. (b)-(c)), and had served a prior prison term (§ 667.5, subd. (b)). A jury convicted him of first degree murder and attempted robbery, and found true all allegations, with the exception of the prison prior.

## **B. The Evidence Adduced At Trial**

Candace Thomas and her domestic partner, John Montgomery, lived together in a room on the third floor of the Vincent Hotel in San Francisco. Herrera lived on the second floor of the hotel.

Around late July or early August 2009, Herrera gave Montgomery a “dime rock of crack cocaine” with the expectation that Montgomery would pay him \$10 in return. Although Herrera repeatedly asked for the money, Montgomery did not pay him.

On September 9, 2009, Michael Lettow, another resident of the hotel, overheard Herrera say to Thomas and Montgomery, “I want my money, I want it. And if you don’t have it, I’m going to ‘F’ you up or kill you if you don’t have it by tomorrow morning.” Thomas and Montgomery responded by saying they would give him his money the next day.

The next day was Thursday, September 10. It was well known at the Vincent Hotel that every Thursday Montgomery would fill his prescriptions for various drugs, including methadone. That day, Herrera waited at the hotel for Montgomery to return from the pharmacy.

Herrera testified that, when Montgomery returned, he sought to collect the methadone tablets he claimed Montgomery owed to him, but did not intend to hurt him or kill him in the process. He never threatened Montgomery and was not even mad at him.

Upon Montgomery’s return to the hotel with Thomas, he and Thomas went up the stairs to their room, arguing along the way. Herrera followed them. Another

hotel resident, Victor Mahakena, saw Herrera and said, “what’s up?” Herrera replied, “I need to get my money, man. I’m broke.”

Herrera went to the doorway of Thomas’s and Montgomery’s room and told them he wanted 20 of Montgomery’s methadone tablets for the money he owed. Thomas told Herrera “to leave [them] the hell alone” and slammed the door in his face. Herrera sat at the top of the stairs. Surveillance video captured him walking back to his room, entering it, and reemerging with a light colored object in his hand.<sup>2</sup>

As Herrera walked down the hallway toward Montgomery’s room, he appeared to conceal the object. Montgomery gave Thomas the bottle of methadone tablets to take downstairs. Herrera bumped into Thomas on the stairway and the two continued walking in opposite directions—Thomas toward the lobby, and Herrera toward Montgomery’s room.

Herrera confronted Montgomery as Montgomery was leaving his room. Mahakena heard Herrera say to Montgomery, “You got my pill . . . ? You got my thing?” Montgomery said, “she’s got the dope downstairs.” Herrera started to attack Montgomery, who was cornered.

According to Herrera, the physical fight between him and Montgomery began when Herrera punched Montgomery in the face “with everything [he] could.” Herrera claimed Montgomery strangled him, caused him to be unable to breathe. As he was losing breath, Herrera stabbed Montgomery. He said he did not mean to do so.

The two men were hunched over, and Montgomery screamed while Herrera struck him. Herrera swung his right arm toward Montgomery. Another hotel resident, Phillip Peoples, saw a knife “come down on [Montgomery].” Peoples left the hotel for fear Herrera might “try to cut [him] too.”

---

<sup>2</sup> Herrera denied that the object he retrieved from his room was a knife. He maintained that he already had the knife with him that morning.

After the stabbing, Montgomery descended the main stairway toward the lobby. Blood “squirt[ed]” out of his arms and sprayed onto the wall. His blood “was all over the place.” Herrera, meanwhile, wiped off the knife blade, returned to his room, and threw the knife out of his second-story window. The knife was later recovered by San Francisco police officers behind the hotel underneath the open window to Herrera’s room. Herrera admitted to throwing his knife out of the window after the stabbing and leaving the hotel because he was “afraid.”

Herrera’s DNA was on the knife handle. The blood on the blade of the knife matched Montgomery’s DNA. Outside the hotel, Thomas held Montgomery, who was dying. As Montgomery started to fall, a bystander grabbed him and laid him down on the sidewalk. Herrera exited the hotel, walking past Thomas and Montgomery.

Thomas pointed at him and yelled, “he killed John.” Herrera put his hands up and said, “I don’t care.” He continued walking toward Hyde Street. Montgomery was taken to the hospital, where he was pronounced dead.

Herrera was arrested near the intersection of Turk and Hyde Streets. At the Tenderloin police station, Herrera asked Officer Raymond Gee if Montgomery was dead. Gee did not answer his question. The pathologist who conducted the autopsy of Montgomery’s body, Dr. Ellen Moffatt, concluded that he had died from a stab wound to the left side of his back that was approximately three- to-four-inches deep.

Dr. Moffatt determined the knife had entered between Montgomery’s eighth and ninth ribs, pierced the lower lobe of his left lung, and made three shallow “defects”—or wounds—to the left and front sides of his heart. The knife also injured two arteries near Montgomery’s heart. The angle of the stab wound and the defects to the heart indicated that the knife had either been inserted and reinserted into Montgomery’s body or had moved within it.

In addition to the fatal stab wound on his back, Montgomery suffered a stab wound to his left arm that was six-inches deep. The knife went through the outside of Montgomery’s left forearm, crossed the elbow joint, and exited on the inside of

his left arm. The wound went through “a lot of muscle” and appeared “defensive.” Montgomery also had several “slash” wounds on the back of his neck, chest, and upper back. According to Dr. Moffatt, Montgomery bled to death as result of his injuries.

At trial, Herrera admitted to stabbing Montgomery after Thomas angered him by slamming the door in his face. Herrera was feeling “dope sick” that day. He had recently lost his job, and the year before a girlfriend of his died under suspicious circumstances.

### **C. Herrera’s Romero Motion**

Herrera agreed to bifurcate the serious felony enhancement—which was based on a 1979 robbery conviction—for submission to the court at sentencing. Prior to sentencing, Herrera filed a *Romero* motion requesting that the court strike this alleged strike, which, if granted, would have allowed him to avoid a doubling of the 25 years-to-life prison term he faced for the murder conviction.

In support of his *Romero* motion, Herrera noted that his subsequent convictions—other than those in this case—had all been for nonviolent crimes. He characterized his criminal record as that “of an addict.” He further noted that his family members were drugs addicts and that this had caused him to be vulnerable to drug use. He argued the fact that the robbery occurred 30 years before he murdered Montgomery showed he was “not an inherently violent person.”

Attached to this motion was a chart defense counsel had prepared documenting various challenges Herrera had faced throughout his life. These included growing up in a poor, violent, and drug-prevalent neighborhood; an abusive, drug-addicted father; the death of his infant daughter; the death of his girlfriend and mother of two of his children from AIDS—as well as the deaths of several other former girlfriends—and his own battles with drug addiction.

On the positive side, Herrera’s chart indicated that he was a “peacemaker” in his family; he was a supportive uncle; he started a Narcotics Anonymous group for

mothers; he worked as a caretaker for his friend's son; and he cared for his grandmother during the final months of her life.

On September 3, 2014, the prosecutor filed a sentencing memorandum opposing Herrera's *Romero* motion. He argued that Herrera had resorted to violence against a "much weaker" man and attempted to evade responsibility for his conduct by hiding the murder weapon and fleeing the scene of the crime. He further noted Herrera's extensive criminal history spanning some 30 years, and attached a copy of Herrera's criminal record.

At Herrera's sentencing hearing on October 3, 2014, defense counsel reiterated that Herrera had not committed a violent crime since the robbery in 1979 and characterized Herrera's present crime as "an aberration." Conceding that the facts of the present crime were "extremely violent," he nevertheless argued that those facts alone should not prevent the court from granting his *Romero* motion. He pointed out that Herrera had been committed to prison on seven separate occasions, had been unable to bring his drug addiction under control, and was willing "to resort to violence to rectify what he consider[ed] to be personal affronts."

The trial court ruled as follows: "I am going to deny the *Romero* motion to strike priors so [Herrera] would not have to go to state prison for 25-years to life on a count of simple possession of drugs, felony conviction. Mr. Romero was convicted of second degree burglaries and drug offenses. [¶] In this case the defendant's criminal history is, he has not [led] a crime-free life. His convictions consist of crimes such as assault, robbery and drug crimes for a span of at least 20, 30 years. And he was sentenced to state prison at least five times. [¶] More importantly, the murder was committed against a defenseless victim who was physically no match for [Herrera], and who suffered multiple stabbings by [Herrera] resulting in death. And a conviction of murder committed under the facts and circumstances in the instant case does not merit striking of the priors. [¶] Motion to strike the prior is denied."

The court subsequently sentenced Herrera to 50 years to life, doubling his 25-to-life term based on the 1979 robbery as a serious and violent felony. One additional year was imposed for use of a deadly weapon.

## **II. DISCUSSION**

Herrera claims the trial court abused its discretion in denying his *Romero* motion. In support of this argument, he emphasizes the remoteness of his prior strike conviction, his difficult upbringing and battle with drug-addiction, and the fact he is nearly 60 years old.

### **A. Applicable Law**

Under section 1385, subdivision (a), a judge “may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.” *Romero* held that “a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, ‘in furtherance of justice’ pursuant to . . . section 1385[, subdivision] (a).” (*People v. Williams* (1998) 17 Cal.4th 148, 158 (*Williams*).)

The court is required to consider “ ‘whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ ” (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*Carmony, supra*, 33 Cal.4th at p. 375.) “[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of

which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Carmony, supra*, 33 Cal.4th at p. 378.)

**B. Denial of the Romero Motion was Not an Abuse of Discretion**

Defense counsel did an able job of showing that Herrera has some positive traits, but we cannot say that, on this record, it was irrational or arbitrary for the trial court to deny *Romero* relief.

The nature and circumstances of Herrera’s convictions show him to be a person capable of great violence, and of carrying it out. He committed first degree murder by stabbing a man to death. By his own account, he initiated the physical confrontation with the victim by “sock[ing] him with everything [he] could,” and admitted that he did not even need the knife to defend himself .

The evidence at trial showed that Herrera was bigger than Montgomery: according to the autopsy, Montgomery was five feet, seven inches tall and weighed 144 pounds; Herrera was described as “bigger” than Montgomery; Herrera testified that he weighed 179 pounds; and Montgomery was described as “a little bitty guy.”

Moreover, the motive for the murder—retribution for a \$10 debt for a crack rock—was trivial and inexcusable. His response upon realizing he had fatally wounded Montgomery, “I don’t care,” showed a lack of remorse. Considered together, Herrera’s conduct indicates a willingness to resort to serious violence as the result of minor provocation, demonstrating himself to be a serious danger to society.

Herrera focuses his argument on his background, character, and prospects, but there was little there in his favor. Excluding his two present felony convictions for first degree murder and attempted robbery, Herrera has at least eight other felony convictions, including two convictions for burglary (in 1978 and 1979), two convictions for possession of a controlled substance (in 1986 and 1991), three convictions for petty theft with a prior (in 1988, 1989, 1992), and a conviction for robbery (in 1979).



In addition to those felonies, Herrera has convictions for assault with a deadly weapon (in 1976), vehicle tampering (in 1978), battery (in 1978), and several misdemeanor petty theft convictions (in 1984, 1986, and 2000). Herrera's record suggests he has "not refrain[ed] from criminal activity" and "did not add maturity to age." (*Williams, supra*, 17 Cal.4th at p. 163.) This is a record of virtually unbroken, continuous criminality, well within the spirit of the Three Strikes law.

Because Herrera is a habitual offender, the court appears to have treated him as someone who has shown that he lacks the discipline to rehabilitate himself, and always will. The record justified it in doing so. He has received numerous grants of probation and performed poorly on them, and has also been to prison several times, but has " 'failed or refused to learn his lesson' " (*Williams, supra*, 17 Cal.4th at p. 163).

Herrera has also failed to bring his drug addiction under control, despite several purported attempts to do so. Thus, his "prospects for the future look no better than the past, in light of [his] record of prior offense and re-offense and his underlying drug addiction." (*People v. Philpot* (2004) 122 Cal.App.4th 893, 906–907.)

In argument on the *Romero* motion, Herrera characterized the brutality shown here as an "aberration," but the record suggested otherwise. He displayed his volatility on the stand, telling the prosecutor he was "acting stupid" and asking him, "You want to try and see how mad I can be before I sock you?" Based on this exchange alone, we are hard pressed to characterize the trial court's decision to deny *Romero* relief "irrational" or "arbitrary." (*Carmony, supra*, 33 Cal.4th at p. 377.)

Citing *People v. Bishop* (1997) 56 Cal.App.4th 1245, Herrera nonetheless argues that his sentence should be mitigated because his 1979 strike conviction is remote. As the People point out, however, there is "nothing mitigating" about the remoteness of a prior strike conviction where, as here, a defendant continues to commit crimes in the period between his prior strike and the current offense. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

Herrera places great emphasis on his age, but age alone is not a mitigating factor. “Otherwise, those criminals with the longest criminal records over the longest period of time would have a built-in argument that the very factor that takes them within the spirit of the Three Strikes law—a lengthy criminal career—has the inevitable consequence—middle age—that takes them outside the law’s spirit.” (*People v. Strong* (2001) 87 Cal.App.4th 328, 345.)

Finally, Herrera argues age within a the broader context of parole eligibility, contending that “in this case, a no-strike sentence of 25 years-to-life fully satisfied all sentencing objectives. The 50 years-to-life sentence, effectively a sentence of life without the possibility of parole, is excessive. [¶] . . . [T]he remoteness of appellant’s over 30 year-old strike, coupled with his difficult childhood and drug and alcohol problems, justified dismissal of the strike. The most significant factor counseling in favor of dismissal is appellant’s relatively advanced age. . . . With a no-strike sentence, appellant has an outside chance of being released on parole around age 80. Under the present two-strike sentence, he will die in prison.”

These are certainly reasonable arguments, but they are perhaps better directed at the appropriate time to the Governor. Our only concern here is whether the trial court considered the appropriate criteria and properly exercised its discretion under *Romero*. We conclude it did.

### **III. DISPOSITION**

The sentence is affirmed.

---

Streeter, J.

We concur:

---

Ruvolo, P.J.

---

Rivera, J.